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I. THE DEFINITIONAL PROBLEM

Black's Law Dictionary offers this primary definition of proximate cause: "That which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces injury, and without which the result would not have occurred."[1] One could hardly fashion a more succinct definition for one of the most elusive concepts in the law.[2] And, as is frequently the case when subtle concepts are reduced to terse verbalization, one could hardly fashion a sentence of equal length containing so many conclusional words and phrases. What is a "natural sequence"? What constitutes a "natural and continuous sequence"? And when is an "intervening cause" "efficient"? Those questions are not raised to condemn Black's; they are intended only to suggest the near impossibility of imputing to the concept of proximate cause a brief definition which will be of meaningful assistance to a court confronting a proximate cause issue.

EDITOR'S NOTE: The author is Professor of Law at The National Law Center of The George Washington University. B.A., University of Pittsburgh (1951); LL. B., University of Pittsburgh School of Law (1956). Professor Seidelson wishes to acknowledge the contribution made by the following authors to the subject of proximate cause. While the approach of this article is relatively original, scholars have never regarded this area of law as a static one and the diversity of their views attests to this fact. *See, e.g.*, A. BECHT & F. MILLER, THE TEST OF FACTUAL CAUSATION IN NEGLIGENCE AND STRICT LIABILITY CASES (1961); G. CALABRESI, THE COST OF ACCIDENTS (1970); L. GREEN, THE LITIGATION PROCESS IN TORT LAW (1965); J. HENDERSON, JR. & R. PEARSON, THE TORTS PROCESS (1975); R. KEETON, LEGAL CAUSE IN THE LAW OF TORTS (1963); C. MORRIS & C.R. MORRIS, JR., MORRIS ON TORTS (2d ed. 1980); R. POSNER, ECONOMIC ANALYSIS OF LAW (1977); W. PROSSER, THE LAW OF TORTS (4th ed. 1971); Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973).

1. BLACK'S LAW DICTIONARY 1103 (5th ed. 1979).

2. *See* W. PROSSER, THE LAW OF TORTS (4th ed. 1971) [hereinafter cited as PROSSER] for this assertion:

To provide such meaningful assistance, it may be helpful to determine just when a proximate cause issue first confronts a court. An understanding of the procedural aspect of proximate cause may concurrently diminish the possibility that an issue will be prematurely characterized as one involving proximate cause, and clarify the underlying reason for the proximate cause requirement. Until the plaintiff has satisfied the tripartite evidentiary conditions of: (1) the defendant's carelessness; (2) the plaintiff's injury; and (3) a factual cause and effect relationship between that carelessness and that injury,[3] no proximate cause issue has yet arisen.

This conclusion gives rise to the following question: Why doesn't evidence of the defendant's carelessness, the plaintiff's injury, and a factual causal relationship between the two constitute a legally sufficient case, without consideration of proximate cause? Such evidence undoubtedly identifies the "bad guy," the injured victim, and the factual relationship between the bad guy's conduct and the victim's injury. Why is the plaintiff further required to meet the proximate cause requirement? Apparently, the law recognizes an inherent impropriety in permitting liability to become wholly disproportionate to culpability.[4] As a result, not even the culpable defendant will be liable to the innocent and injured plaintiff in *every* case in which the defendant's culpable conduct is a cause in fact of the plaintiff's injury. Therefore,

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> There is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion. Nor, despite the manifold attempts which have been made to clarify the subject, is there yet any general agreement as to the proper approach.

Id. at 236 (footnote omitted).

3. Failure on the part of the plaintiff to introduce evidence of any one of these elements precludes recovery without the necessity of considering proximate cause. The third requirement, that of showing the factual cause and effect relationship between the defendant's carelessness and the plaintiff's injury, is known as the *sine qua non* rule:

> [M]any courts have derived a rule, commonly known as the "but for" or "sine qua non" rule, which may be stated as follows: The defendant's conduct is not a cause of the event, if the event would have occurred without it. At most this must be a rule of exclusion: if the event would not have occurred "but for" the defendant's negligence, it still does not follow that there is liability, since considerations other than causation . . . may prevent it.

Id. at 238-39 (footnotes omitted).

4. *See* Marshall v. Nugent, 222 F.2d 604 (1st Cir. 1955), where Chief Judge Magruder stated for the court:

> Back of the requirement that the defendant's culpable act must have been a proximate cause of the plaintiff's harm is no doubt the widespread conviction that it would be disproportionately burdensome to hold a culpable actor potentially liable for all the injurious consequences that may flow from his act, i.e., that would not have been inflicted "but for" the occurrence of the act. This is especially so where the injurious consequence was the result of negligence merely.

Id. at 610.

in each case in which a court confronts a proximate cause issue, it should resolve that issue in light of the basic reason for the proximate cause requirement, which is to ensure that liability does not become wholly disproportionate to culpability.[5] Given this reason, the court should remain sensitive to the various factors which pertain to the degree of culpability of the defendant in the particular case. Presumably, as the relative degree of culpability is enhanced, the less likely it will be that the liability sought to be imposed on the defendant would be wholly disproportionate to that culpability.

A court's basic sense of propriety and fairness only partially accounts for its attempt to balance liability against culpability. Apart from these fundamental juristic principles, a more pragmatic reason exists for the judicial concern that liability should not be permitted to become wholly disproportionate to culpability. Were such liability to be imposed, a number of familiar activities might become economically prohibitive. To the extent that those activities achieve a relatively high level of social utility, society, as well as the defendant, may lose.[6] Consequently, in a case presenting a proximate cause issue, the court should consider the relative level of social utility of the activity in which the defendant was engaged at the time of his careless conduct a factor in determining his culpability.

When a court is asked by a defendant to rule that, as a matter of law, his conduct was not the proximate cause of the plaintiff's injury, it should generally refrain from doing so for two reasons. The first is substantive; the second, procedural. The first reason why a judge should give careful consideration before rendering a directed verdict has already been partly identified: before a proximate cause issue can arise, the court must receive evidence of the defendant's carelessness, the plaintiff's injury, and a factual cause and effect relationship between the two. Once the evidence has identified the "bad guy" and the victim injured as the result of the bad guy's conduct, fairness dictates that even though the judge may be tempted to grant the motion, if there is any doubt he should give the victim the benefit of the doubt.

5. Throughout this article, the phrase "liability wholly disproportionate to culpability" is used both to describe the substantive standard which ought to be applied and to emphasize that proximate cause cannot be calculated with mathematical nicety, but rather expresses a balance of various factors according to a rule of reasonability. The choice of the term "culpability" is not reflective of a retributive theory of tort liability, but denotes a compensatory approach predicated upon an alleged fault. Consequently, the subject of strict liability is beyond the scope of this article.

6. *See* Just's, Inc. v. Arrington Constr. Co., 99 Idaho 462, 583 P.2d 997 (1978), where the court stated: "If the [contractor] defendant's liability were extended to all those who suffered any . . . loss, its liability could become grossly disproportionate to its fault. Such potential liability would unduly burden any construction in a business area." *Id.* at 470, 583 P.2d at 1005. *See* notes 89-93 and accompanying text *infra*.

This gives the jury the opportunity to recompense the plaintiff by imposing adverse economic consequences upon the culpable actor.

The second reason for the judge's self-restraint in ruling on the motion modifies the discretion of the first: if the proximate cause question is a close one, that is, a reasonable fact-finder could just as easily conclude that the plaintiff's injury was or was not proximately caused by the defendant's negligence, then a matter-of-law determination is technically inappropriate. The defendant's effort to secure a judicial ruling on the absence of proximate cause is likely to take the form of a motion for nonsuit or directed verdict. Assuming that the three previously mentioned evidentiary requisites have been satisfied,[7] either motion requests the court to rule, as a matter of law, that the defendant's conduct was still not a proximate cause of the plaintiff's injury. If a reasonable fact-finder, namely, a jury, could resolve the proximate cause issue either way, under standard civil procedure the court should deny the motion and submit the issue to the jury. Moreover, submission to the jury when the court is not justified in concluding that proximate cause does not exist as a matter of law tends to ameliorate any unfairness to the defendant arising out of calling the close ones against the defendant. Even if the court denies the defendant's motion for a directed verdict, the jury may still determine factually that the defendant's conduct was not a proximate cause of the plaintiff's injury.

A proper starting point for any worthwhile analysis of proximate cause is undoubtedly the case of *Palsgraf v. Long Island Railroad.*[8] Due to the carelessness of the defendant's employees, a package wrapped in newspaper was knocked from the arm of a passenger attempting to board one of defendant's trains. The unmarked package fell between the boarding platform and the train so that the fireworks that it contained exploded. The explosion caused a set of scales located a substantial distance away to fall on the plaintiff, Mrs. Palsgraf. To recover for the injuries thus sustained, Mrs. Palsgraf sued the railroad. A judgment for the plaintiff was reversed by the New York Court of Appeals because of its determination that, as a matter of law, the carelessness of the defendant's employee had not been a proximate cause of the plaintiff's injuries.

Cardozo, writing for the majority, arrived at that conclusion because the plaintiff had not been within the orbit of risk created by the negligence attributable to the defendant; at the time of that negligence, no injury of any kind to the plaintiff was reasonably foreseeable. Andrews, dissenting, wrote: "What we do mean by the

7. *See* note 3 and accompanying text *supra.*
8. 248 N.Y. 339, 162 N.E. 99 (1928).

word 'proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics."[9]

It has become popular to cite that dissenting opinion of Judge Andrews with approbation,[10] and, indeed, it is difficult to dispute the conclusion that proximate cause is a matter of "practical politics." Still, it seems that Cardozo's orbit of risk approach has a couple of advantages over Andrews' pragmatic approach. Even to one accepting the quoted excerpt from Andrews' dissenting opinion as an accurate depiction of proximate cause, a difficult question remains. How is a trial court, confronted with a defendant's motion for directed verdict on the basis of the plaintiff's failure to satisfy proximate cause, to apply Andrews' "practical politics"? How are the considerations "of convenience, of public policy, of a rough sense of justice" to be applied to the specific evidence before the court? Cardozo's orbit of risk test at least circumscribes the issues to be considered by the court by directing its attention to this relatively specific evidentiary question: Viewing the plaintiff's evidence in the most favorable light, could a reasonable jury conclude that defendant's negligence created a reasonably foreseeable risk of injury of any kind to the plaintiff? If the trial court answers that question affirmatively, the defendant's motion should be denied; if negatively, then the defendant's motion should be granted because the defendant's negligence was evidently not a proximate cause of the plaintiff's injury. To the extent that Cardozo's approach provides the trial court with an enhanced degree of specificity, thus affording a more

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9. *Id.* at 352, 162 N.E. at 103 (Andrews, J., dissenting).

10. *See* Petition of Kinsman Transport Co. (*Kinsman I*), 338 F.2d 708 (2d Cir. 1964), *cert. denied*, 380 U.S. 944 (1965), where Judge Friendly stated:

> [P]erhaps in the long run one returns to Judge Andrews' statement in Palsgraf . . . "It is all a question of expediency, * * * of fair judgment, always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind."

Id. at 725 (quoting Judge Andrews' dissenting opinion in Palsgraf v. Long Island Railroad, 248 N.Y. at 354-55, 162 N.E. at 104) (citation omitted; alteration in original). *See* Petition of Kinsman Transit Co. (*Kinsman II*), 388 F.2d 821 (2d Cir. 1968). "In the final analysis, the circumlocution whether posed in terms of 'foreseeability,' 'duty,' 'proximate,' 'remoteness,' etc. seems unavoidable. As we have previously noted, 338 F.2d at 725, we return to Judge Andrews' frequently quoted statement in Palsgraf . . . ." *Id.* at 825 (Kaufman, J.) (citing *Kinsman I*, 338 F.2d at 725). *See also* Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1 (1953), where the author states:

> [T]he opinion of Andrews is as barren as is Cardozo's. It does, I think, come closer to a recognition of the difficulties of the problem and the many factors that may bear on it, and is less arbitrary in postulating an ironclad rule; but the formula it offers is no better as a universal solvent or a philosopher's stone.

Id. at 27.

refined test for resolving the proximate cause issue, it enjoys a marked advantage over Andrews' approach.

A second advantage which the orbit of risk test possesses over the practical politics test also relates to specificity, but in a somewhat less mechanical fashion. It appears that Andrews' practical politics approach at least nominally incorporates each of the considerations set forth earlier in this article as the basis for the proximate cause requirement and the factors to which a court confronted with a proximate cause issue should remain sensitive. However, it would be difficult to satisfactorily prove that when Andrews' approach is actually applied to particular cases, these principles are consistently emobodied in the results. Each of us has subjective concepts of convenience, public policy, and a rough sense of justice, as does each trial judge and probably each member of an appellate court. As those individual concepts shift from judge to judge and court to court, practical politics, because of its unique vulnerability to idiosyncratic application, provides relatively little assurance that the basic reason for the proximate cause requirement and, consequently, the underlying factors to which the court should be sensitive, will be recognized and applied in a manner calculated to achieve the intended purposes.

On the other hand, Cardozo's orbit of risk test provides, to some extent at least, an inherent assurance that those purposes will be served. There is an essential relationship between the degree of culpability of a defendant's conduct and the number of persons foreseeably threatened with injury by that conduct. If a defendant's negligence creates a reasonably foreseeable risk of injury to hundreds, then it is logical to assume that the culpability of that conduct will generally exceed the culpability of negligence which creates a reasonably foreseeable risk of injury to but one individual. Consequently, where a plaintiff's opportunity to recover from a defendant depends upon the conclusion that the culpable conduct at issue created a reasonably foreseeable risk of injury to the plaintiff, the likelihood that liability will become wholly disproportionate to culpability is diminished substantially. Therefore, Cardozo's orbit of risk test accomplishes two important objectives: It provides trial courts with a relatively precise test to apply in resolving proximate cause issues and it complements the basic reason for the proximate cause requirement.

Justice Cardozo's opinion in *Palsgraf* also provides a prelude to the process of refining the concept of proximate cause in accordance with its underlying rationale. The Justice referred to the then prevalent assumption that once a wrong affecting a particular plaintiff has been established, it may support the imposition of liability for any and all consequences. He noted that it may be necessary, however, to modify the liability created by a negligent act when an injury unforeseeable in

degree or kind obtains in reality instead of its foreseeable consequences.[11] Having found as a matter of law that the plaintiff was without the orbit of risk, *i.e.*, that the defendant's negligence created no reasonably foreseeable risk of any kind to the plaintiff, Justice Cardozo had no need to decide the nature and extent of injury for which the defendant might have been liable had the plaintiff been within the orbit of risk. However, the assumption recognized in the dictum in *Palsgraf* had derived from an earlier decision of renown, *In re Polemis*.[12]

In *Polemis*, agents of the defendant negligently caused a heavy plank to fall into the hold of the plaintiff's[13] ship. The plank caused a spark which ignited petrol vapor in the hold; the ensuing fire resulted in the total loss of the ship. Confronted with a factual finding that the spark and, consequently, the fire were not reasonably foreseeable, the court in *Polemis* was required to determine the propriety of an arbitrator's decision that the defendant should be liable for the total loss. The court noted a portion of the defendant's argument against the imposition of such liability:

> The [defendant's] junior counsel sought to draw a distinction between *the anticipation of the extent of damage* resulting from a negligent act, and *the anticipation of the type of damage* resulting from such an act. He admitted that it could not lie in the mouth of a person whose negligent act had caused damage to say that he could not reasonably have foreseen the extent of the damage, but he contended that the negligent person was entitled to rely upon the fact that he could not reasonably have anticipated the type of damage which resulted from his negligent act.[14]

The court's response to the argument was succinct: "I do not think that the distinction can be admitted."[15] Consequently, the court affirmed the arbitrator's award. In effect, the court held that, where the

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11. Justice Cardozo stated:

> We may assume, without deciding, that negligence, not at large or in the abstract, but in relation to the plaintiff, would entail liability for any and all consequences, however novel or extraordinary . . . . There is room for argument that a distinction is to be drawn according to the diversity of interests invaded by the act, as where conduct negligent in that it threatens an insignificant invasion of an interest in property results in an unforeseeable invasion of an interest of another order, as, *e.g.*, one of bodily security. Perhaps other distinctions may be necessary. We do not go into the question now. The consequences to be followed must first be rooted in a wrong.

Palsgraf, 248 N.Y. at 346-47, 162 N.E. at 101 (citations omitted).

12. [1921] 3 K.B. 560 (C.A.).

13. "Messrs. Polemis and Boyazides [were] the owners of the Greek steamship *Thrasyvoulos* . . . ." *Id.* at 561. For ease of verbalization, here and at other points in the article, the singular form is used in referring to the ship owners.

14. *Id.* at 571-72 (emphasis added).

15. *Id.* at 572.

defendant's negligence created a reasonably foreseeable risk of injury of any kind to the plaintiff and that negligence resulted in injury to the plaintiff, the defendant would be liable for that injury, irrespective of the extent of injury and without regard to the type of injury.

II. The Relationship Between Liability and the Extent of Damage

It is difficult to either condone or repudiate the result in *Polemis* since the court's opinion does not provide sufficient facts for such an assessment. For example, did the negligent dropping of the "heavy plank" into the hold create a reasonably foreseeable risk of (a) only relatively insignificant damage to the ship or (b) substantial and perhaps even irreparable damage to the ship?[16] If (a), the result is troubling; if (b), it is not: the difference between (a) and (b) marks a substantial difference in the relative degree of culpability attributable to the defendant. Since the proximate cause requirement exists to assure that liability does not become wholly disproportionate to culpability, the relative degree of culpability of the defendant in *Polemis* seems to have been a legitimate, even critical, factor for judicial consideration. Setting aside, for the moment, the relationship between the type of injury reasonably foreseeable and a defendant's culpability, the extent of damage reasonably foreseeable as a consequence of the negligence attributable to a defendant would seem to bear an intimate relationship with the relative degree of culpability of that negligence. Yet even the defendant's counsel in *Polemis* conceded that the defendant could not avoid liability simply because the *extent of damage* sustained exceeded the reasonably foreseeable extent of damage. Why was the relationship between liability and the extent of damage reasonably foreseeable automatically negated? The case of *McCahill v. New York Transportation Co.* illuminates the reasoning behind this position.[17]

In *McCahill*, a taxicab owned by the defendant struck the plaintiff's intestate one night on Broadway in New York City "under circumstances which, as detailed by the most favorable evidence, permitted the jury to find that the former was guilty of negligence and the latter free from contributory negligence. As a result of the accident the intestate was thrown about twenty feet, his thigh broken and his knee injured."[18] Subsequently, the victim died of delirium tremens,

16. "In the present case it is clear that the act causing the plank to fall was in law a negligent act, because some damage to the ship might reasonably be anticipated." *Id.* at 575.

17. 201 N.Y. 221, 94 N.E. 616 (1911).

18. *Id.* at 222, 94 N.E. at 617.

"precipitated"[19] by the impact injuries but obviously contributed to by "the preexisting alcoholic condition of the intestate."[20] On appeal, defendant argued that, as a matter of law, the negligence attributable to it was not a proximate cause of the intestate's death.[21] The court rejected this argument and affirmed the judgment[22] for the plaintiff by wisely concluding that the negligent actor takes his victim as he finds him.[23] That conclusion comports with the basic concept of reasonable foreseeability for a couple of reasons.[24] Wholly perfect physical specimens are the exception rather than the rule. Consequently, if the negligent actor's victim is less than a perfect specimen, the defendant's reasonable expectations can hardly be said to have been frustrated. In addition, the human body, magnificent as it is in its complexity and functioning, is uniquely vulnerable to a nearly infinite variety of injuries when subjected to impact with inanimate objects. Therefore, the negligent actor can hardly plead surprise when the nature or extent of injury sustained by his victim proves to be extreme or even fatal. When a taxicab strikes a pedestrian and sends the victim hurtling twenty feet through the air, presumably to land on an unyielding street, the responsible party should not be outraged by the imposition of liability in a wrongful death action.

Those two factors — the rareness of perfect physical specimens and the human body's vulnerability to severe injury or death — are complemented by a third consideration which sustains the conclusion

19. *Id.* at 223, 94 N.E. at 617.

20. *Id.*

21. *Id.*

22. *Id.*

23. The *McCahill* court stated:

> The principle has become familiar in many phases that a negligent person is responsible for the direct effects of his acts, even if more serious, in cases of the sick and infirm as well as in those of healthy and robust people, and its application to the present case is not made less certain because the facts are somewhat unusual and the intestate's prior disorder of a discreditable character. . . . The principle is also true although less familiar, that one who has negligently forwarded a diseased condition and thereby hastened and prematurely caused death cannot escape responsibility even though the disease probably would have resulted in death at a later time without his agency.

Id. at 223-24, 94 N.E. at 617.

24. For the reasons stated in the text accompanying notes 25-28 *infra*, I would dissent from Judge Friendly's view that:

> The oft encountered argument that failure to limit liability to foreseeable consequences may subject the defendant to a loss wholly out of proportion to his fault seems scarcely consistent with the universally accepted rule that the defendant takes the plaintiff as he finds him and will be responsible for the full extent of the injury even though a latent susceptibility of the plaintiff renders this far more serious than could reasonably have been anticipated.

Kinsman I, 338 F.2d at 724 (2d Cir. 1964).

achieved in *McCahill.* Man is a product of more than two million years of evolution, which indicates that it has taken a long time for human beings to achieve their present level of development. Notwithstanding that long period of common evolution and the resultant physiological factors shared by all persons, each individual is unique and cannot be replaced. The loss of a single human being is irreparable. When any individual has his physical integrity violated, with a resulting loss of physical, mental, or emotional capacity, that diminution of capacity is forever lost to the victim and to all of society. Very simply, human life is precious. One whose culpable conduct terminates or diminishes a human life should feel an appropriate sting of liability and the victim or his dependent survivors should receive the most nearly adequate compensation feasible. *McCahill* accomplishes those results.

But to what extent are those considerations applicable to *Polemis*, where only property damage and no personal injury was involved? Realistically, the distinction between property damage and personal injury is oftentimes less significant in fact than in theory. Destroy my briefs and notes for Torts and, in a very real sense, you have destroyed a part of me: that physical and intellectual effort which produced those briefs and those notes. Similarly, destruction of the plaintiff's ship in *Polemis* destroyed that part of the plaintiff's physical and intellectual effort which made the plaintiff's ownership of the vessel a reality. Whether the property destroyed is my briefs and notes or the ship in *Polemis*, however, the loss is modified by the fact that property can be duplicated by the owner, to whom the capability for replacing it may be attributed. Property is simply not as precious and irreplaceable as human life. Moreover, property is not as vulnerable as human life to a nearly endless variety of injuries differing in nature and extent as the result of trauma. Dropping a plank in the hold of a ship, absent reasonably foreseeable intervening events, plainly does not pose a realistic risk of the total loss of the ship; dropping a plank of even modest size on the head of a human being does pose a significant risk of death or permanent injury. The liability imposed on the defendant in *Polemis* probably did come as an outrageous suprise which frustrated the reasonable expectations of even the admittedly culpable defendant.

Polemis offers a potentially ameliorating factor, however, in that the court noted the seaworthiness of the ship prior to the fire in assessing the defendant's liability.[25] This implies that, to the extent that the ship was imperfect prior to the culpability attributable to the defendant, the damages assessed for its loss would be diminished. A battered old

25. When the ship "was placed at the charterers' disposal . . . she [was] tight, staunch, strong and every way fitted for ordinary cargo service . . . ." 3 K.B. at 561.

hulk simply isn't as valuable as a letter-perfect ship. Yet that same consequence existed in *McCahill*; to the extent that the decedent's preexisting alcoholism would provide a shorter life expectancy or a lower level of earning capacity, the damages imposed on the defendant would be reduced.[26] Assuming that the imperfections of the ship in *Polemis* and the pedestrian in *McCahill* were comparable in terms of their potential to mitigate damages, two critical distinctions remain: (1) Human life is more precious than property; and (2) human life is more vulnerable than property to injury of a nature and extent nearly impossible to predict with any accuracy. Those distinctions suggest that, even to one acquiescing wholly in the *McCahill* decision, the *Polemis* conclusion (and the defense counsel's concession) that liability could not be limited to the *extent* of damage reasonably foreseeable does not necessarily follow. Indeed, such a limitation would seem to be entirely consistent with the basic reason for the proximate cause requirement of ensuring that liability does not become wholly disproportionate to culpability.

Nor would that limitation impose unfair burdens on the plaintiff in *Polemis*. The plaintiff's recovery then would have been limited to the damage reasonably foreseeable from dropping a plank into the ship's hold, without regard to the destruction caused by the not reasonably foreseeable fire. In that case, plaintiff would have confronted the evidentiary problem of presenting legitimate evidence of the likely damage absent the fire. Where personal injury or wrongful death actions are concerned, however, imposing on the plaintiff the burden of presenting wholly hypothetical evidence seems abhorrent. It is simply too difficult to realistically determine the nature and extent of the injuries which a person would have sustained absent some intervening event, such as the malfunction of an automobile driver's head restraint,[27] given the unique vulnerability of the human body to trauma and the impossibility of fairly predicting the nature and measure of injury which the body may suffer if trauma occurs. Those difficulties are lessened substantially, however, when the hypothetical evidence goes to the nature and extent of damage to property. Duly qualified experts, without resort to farfetched speculation, should be able to testify on the kind and extent of damage likely to result from the dropping of a plank of a particular size, weight, and shape a specified distance into a

26. "It is easily seen that the probability of later death from existing causes for which a defendant was not responsible would probably be an important element in fixing damages, but it is not a defense." McCahill v. New York Transportation Co., 201 N.Y. at 224, 94 N.E. at 617.

27. *See* Huddell v. Levin, 537 F.2d 726 (3d Cir. 1976); Seidelson, *The 402A Defendant and the Negligent Actor*, 15 DUQ. L. REV. 371, 393 (1977).

ship's hold of particular structure and condition. Consequently, imposing such evidentiary requirements on the plaintiff in *Polemis* does not appear outrageous or unfair.

Another consequence of limiting the plaintiff's damages in *Polemis* to the dollar value of the reasonably foreseeable damages arising out of the defendant's culpability entails important substantive considerations. Despite the fact that the defendant's conduct resulted in the total loss of the plaintiff's ship, the plaintiff would be able to recover only a fraction of that actual loss. Even if one considers that the magnitude of the injury resulting from the defendant's carelessness was unexpected, this limiting of the plaintiff's recovery appears unfair at first blush.

Factually, it was the defendant's culpability which caused the total loss of the ship. If one were to ask who should bear the economic burden resulting from the unanticipated loss produced by the dropping of the plank, innocent and injured plaintiff or culpable defendant, there would be an understandable impulse to pin the loss on the defendant. But it is here that the proximate cause requirement and its underlying rationale come into play. If the defendant's conduct produced a reasonably foreseeable risk of only relatively minor damages to the planitiff's ship, would not the imposition of liability on the defendant for the full value of the ship produce liability wholly disproportionate to culpability? More specifically, if the defendant's conduct created a reasonably foreseeable risk of causing only a dent in a bulkhead, repairable at minimal cost and not rendering the ship unusable even if not repaired, the imposition of liability on the defendant for the full value of the ship would frustrate the basic reason for the proximate cause requirement. Therefore, so long as the proximate cause requirement exists to assure that liability does not become wholly disproportionate to culpability, the liability imposable on the defendant in *Polemis* could have been appropriately limited to the reasonably foreseeable extent of damage to the plaintiff's ship. The plaintiff's uncompensated loss, the difference between reasonably foreseeable damage and total destruction of the ship, seems precisely the kind of cost which plaintiffs should bear in order to preserve the legal significance of proximate cause and its principal rationale. Thus, where a defendant's negligence creates a reasonably foreseeable risk of damage to a plaintiff's property, but a risk of insubstantial property damage only, proximate cause should preclude liability for any substantial property damage which far exceeds the extent of the foreseeable damage.

In *Polemis*, that conclusion is supported by various considerations. The defendant's activity, off-loading cargo, is one with a relatively high level of social utility. If that activity becomes economically prohibitive as a result of the imposition of liability far exceeding reasonable expec-

tations, society, as well as the defendant, will suffer. Moreover, an analysis of the defendant's culpability in *Polemis* as a separate issue from that of compensating the plaintiff for the loss of his ship reveals that the level of culpability was relatively low. Assuming that the defendant's conduct did not give rise to a reasonably foreseeable risk of fire or of total or even substantial destruction of the ship, and conceding that dropping the plank into the hold was culpable, if the most which could be contemplated as a consequence of that conduct was a dented bulkhead, liability for the total value of the ship would seem to be wholly disproportionate to the culpability.

Suppose, however, there had been an employee of the stevedore in the hold into which the plank was dropped.[28] It may be presumed that the presence of a human being in the orbit of risk created by the defendant's carelessness would enhance the relative degree of culpability attributable to him where the employee's presence was reasonably foreseeable. However, the further question of whether or not the defendant should be liable for the full value of the ship is not susceptible of easy resolution.

In a situation where the culpability of a defendant is enhanced by the reasonably foreseeable presence of an employee in the ship's hold, the culpable conduct would then have created a reasonably foreseeable risk of personal injury or death to the employee in addition to a reasonably foreseeable risk of relatively minor property damage to the ship. Mechanically, the question of holding a defendant liable to a plaintiff shipowner for the total loss of a ship can be posed in the following fashion: If the defendant's conduct creates a reasonably foreseeable risk of relatively minor property damage to the plaintiff and a reasonably foreseeable risk of personal injury or death to a third person, should the defendant be liable *in toto* to the plaintiff if the defendant's conduct results in the not reasonably foreseeable total loss of the plaintiff's property?

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28. In fact, persons were present:

> There were four or five of the Arab shore labourers in the lower hold filling the slings which, when filled, were hove up by means of the winch situated on the upper deck to the 'tween decks level of the platform on which some of the Arabs in the 'tween decks were working. . . . In the course of heaving a sling of the cases from the hold the rope by which the sling was being raised or the sling itself came into contact with the boards placed across the forward end of the hatch, causing one of the boards to fall into the lower hold . . . .

Polemis, 3 K.B. at 562-63. For reasons stated in the text accompanying notes 28-32 *infra*, the presence of the workers in the hold would justify imposing liability on the defendant for the full value of the ship. The court, however, did not rest its opinion on the presence of the endangered workers and the result achieved by the court traditionally has not been explained on that ground. In the text, I have treated the *Polemis* result in the traditional manner.

In *Palsgraf*, Justice Cardozo set forth a different hypothetical which may cast some light on the instant question:

> A guard stumbles over a package which has been left upon a platform. It seems to be a bundle of newspapers. It turns out to be a can of dynamite. To the eye of ordinary vigilance, the bundle is abandoned waste, which may be kicked or trod on with impunity. Is a passenger at the other end of the platform protected by the law against the unsuspected hazard concealed beneath the waste?[29]

Justice Cardozo's hypothetical involves a situation where there existed, at best, only a reasonably foreseeable risk of minor damage to one person's property, but personal injury occurred to another individual. In the case where no foreseeable risk of personal injury existed, Justice Cardozo argued, the culpability of a defendant has not reached an order of magnitude sufficient to justify recovery by a plaintiff undisclosed to the eye of reasonable vigilance for the invasion of a personal as opposed to a property interest. Justice Cardozo's hypothetical, like the question posed by this article above, involves a "diversity of interests"; the distinction between his hypothetical and our question is that the latter involves a risk of personal injury which is reasonably foreseeable. It is submitted that the difference in concerns; *i.e.*, freedom from personal injury and freedom from property damage, is not really significant when both risks are reasonably foreseeable results of a defendant's culpable conduct. Moreover, it is legally insignificant that the property owner and the threatened personal injury victim are different individuals. If a defendant's culpable conduct creates a reasonably foreseeable risk of damage, even minor, to a plaintiff's property and a reasonably foreseeable risk of personal injury or death to a third person, even though the latter does not eventuate, the relative degree of culpability of that conduct is substantially greater than it would have been absent any reasonably foreseeable risk of injury to a third person.

The fortuitous avoidance of personal injury to a third person does nothing to diminish the level of that culpability. Consequently, if that culpable conduct results unexpectedly in the total destruction of a plaintiff's property, holding a defendant liable for the total loss would not result in the imposition of liability wholly disproportionate to culpability.

Neither would it result in an inappropriate "windfall" to the plaintiff, who would merely be recovering for the actual damage he sustained, *viz.*, in *Polemis*, the loss of the ship. While that recovery would be warranted by the real, although unrealized, risk of personal injury to a third person, the recovery would not exceed the plaintiff's actual

29. 248 N.Y. at 342-43, 162 N.E. at 100.

loss and would be related intimately to the enhanced culpability attributable to the defendant. Absent the risk of personal injury to a third person, a defendant would avoid liability for the total loss sustained by a plaintiff under this formulation, because such liability would be wholly disproportionate to his culpability. The risk of personal injury sufficiently enhances a defendant's culpability so that liability for a plaintiff's entire property loss would no longer be wholly disproportionate.

The question remains whether that conclusion is still acceptable if the total property damage is exceptionally costly. In *Polemis*, the damages imposed on the defendant were in the amount of £ 196,165 1s. 11d.[30] Taking into account the date of the case, that would translate into approximately $800,000. Damages in that amount, it is submitted, would only be consistent with the basic reason for the proximate cause requirement if the defendant's conduct, in addition to creating a reasonably foreseeable risk of relatively minor damage to plaintiff's ship, had created a reasonably foreseeable risk of personal injury or death to a third person in the ship's hold. Because the reasonably foreseeable risk of personal injury or death substantially enhances the degree of culpability of a defendant's conduct, a higher degree of accountability for property damage based on that conduct is analytically acceptable.

Moreover, the dollar value of the personal injury or wrongful death action is not the ceiling on a defendant's liability for destruction of a plaintiff's personal property.[31] For example, if in *Polemis* personal injury or death had occurred but no action based on either of these had been brought, and neither action would have been likely to produce an $800,000 judgment, the plaintiff shipowner would still be permitted to recover the full value of his ship. The proximate cause requirement does not exist to ensure that liability will not exceed a precise dollar value; it exists to ensure that liability will not become wholly disproportionate to a defendant's culpability. Where a defendant's conduct creates a reasonably foreseeable risk of personal injury or death to a third person as well as a reasonably foreseeable risk of relatively minor damage to a plaintiff's property, subjecting that defendant to liability for the total actual loss of the plaintiff's property would not make the defendant vulnerable to liability wholly disproportionate to culpability.

Suppose that the person in the hold were an employee of defendant and, for that reason, incapable of securing any tort judgment against

30. 3 K.B. at 564.

31. If the mere risk of personal injury is sufficient to warrant a full recovery by the plaintiff for the property damage sustained, then a priori the actual occurrence of personal injury in any amount would be more than enough reason to permit the plaintiff a full recovery.

him. Should that relationship preclude the imposition of liability on the defendant for the total loss of the plaintiff's property? Even assuming that the imperiled employee, if injured, would be limited to a rather restrictive workmen's compensation award, such legal constructs have no inherent mitigating effect on the culpability of the conduct attributable to the defendant. The enhanced degree of that culpability arises out of the reasonably foreseeable risk of personal injury or death to the human being in the hold. That enhanced culpability subsists whether or not the injured person has the legal capacity to secure a tort judgment against the defendant.

In conclusion, if a defendant's culpable conduct creates a reasonably foreseeable risk of relatively minor damage to a plaintiff's property and a reasonably foreseeable risk of personal injury or death to a third person, and that conduct results in the total loss of the plaintiff's property, the defendant should be subjected to liability for that total loss, whether or not the third person fortuitously avoids injury and without regard to the difference in dollar value between the total property loss and the potential personal injury or wrongful death action.[32]

III. The Relationship Between Liability and the Type of Damage

The *Polemis* court's rejection of defendant's argument that liability should not be imposed for damages of a type[33] not reasonably foreseeable was itself repudiated in *Wagon Mound I*.[34] There, because of the defendant's negligence, furnace oil was discharged from a ship and came in contact with the plaintiff's wharf. The oil was ignited, apparently as the result of welding being performed on the wharf, and the fire substantially destroyed the wharf. The court concluded that, because the combustion of the oil was not reasonably foreseeable, the defendant was not liable for the fire damage to the plaintiff's wharf. Although the plaintiff was within the orbit of risk, it being reasonably

32. I would treat this situation as an exception to the general rule, *see* text accompanying note 36 *infra*, that both the orbit of risk test (*Palsgraf*) and the general manner of injury reasonably foreseeable test (*Wagon Mound I* and *II*; *see* notes 35-40 and accompanying text *infra*) must be satisfied. Although the plaintiff property owner is within the orbit of risk, the manner of injury which occurred need not have been within the general manner of injury reasonably foreseeable. The *Wagon Mound* test in this situation is inapplicable because: (1) the degree of culpability attributable to the defendant is substantially enhanced as a result of the reasonably foreseeable risk of personal injury or death to the third person and (2) the inherent limitation on the damages recoverable by the plaintiff for a loss restricted to property eliminates any likelihood that liability will become wholly disproportionate to culpability.

33. *See* text accompanying note 14 *supra*.

34. Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'r Co. (*Wagon Mound I*), [1961] A.C. 388 (N.S.W.).

foreseeable that the oil would reach the wharf and adversely affect the functioning of the wharf in a minimal way, the manner of injury which in fact occurred, *i.e.*, conflagration, was not reasonably foreseeable.[35] For that reason, the defendant was not liable for the damages sustained by the plaintiff. The result of combining *Palsgraf* and *Wagon Mound I*, is a two-step proximate cause test.[36] After adducing evidence of the defendant's carelessness, the plaintiff's injury, and a factual cause and effect relationship between the two,[37] the plaintiff must offer evidence sufficient to justify a reasonable factual finding that: (1) the defendant's conduct created a reasonably foreseeable risk of injury of some kind to the plaintiff (*Palsgraf*); and (2) the manner of injury which occurred was within the general manner of injury reasonably foreseeable (*Wagon Mound I*). The second step is an appropriate requirement to impose on the plaintiff in view of the principal reason for the proximate cause requirement. Absent that burden, the defendant in *Wagon Mound I* would have been liable for the fire damage to the plaintiff's wharf and that liability, if one accepts the conclusion that the combustion of the oil was not reasonably foreseeable, would have been wholly disproportionate to the defendant's culpability.

Wagon Mound II[38] arose out of the same fact situation which produced *Wagon Mound I*, but it differed in this regard: The plaintiffs, as the owners of two ships damaged in the fire, ultimately recovered for their property loss. The difference in result is probably attributable to two factors noted by the court. First, the ship owners were not required to exercise the same circumspection as the wharfinger in presenting evidence that the combustion of the oil had been reasonably foreseeable. The welding on the wharf had certainly contributed to that combustion, and from the perspective of the wharfinger, persuasive evidence that such a result was reasonably foreseeable would have evidenced contributory negligence on the plaintiff's part. Free of the fear of inculpating themselves, the ship owners presumably were able to offer more persuasive evidence of the reasonable foreseeability of fire. If that evidence were sufficient to justify a factual determination that the fire was reasonably foreseeable, subjecting the defendant

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35. The court in *Wagon Mound I* stated:

> The trial judge . . . made the all-important finding, which must be set out in his own words: "The raison d'être of furnace oil is, of course, that it shall burn, but I find the defendant did not know and could not reasonably be expected to have known that it was capable of being set afire when spread on water."

Id. at 413.

36. *See* note 32 *supra*, noting an exception to this test.

37. *See* note 3 and accompanying text *supra*.

38. Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty. (*Wagon Mound II*), [1967] 1 A.C. 617 (N.S.W.).

to liability for the fire loss would not contravene that aspect of proximate cause which requires that the manner of injury which occurred be within the general manner of injury reasonably foreseeable.

The second factor addressed by the court concerned the defendant's relatively high degree of culpability,[39] since the discharge of the furnace oil was contrary to the clear duty and interest of the defendant, as well as the interest of the plaintiffs. It could have been avoided without any additional expense, indeed its avoidance would have resulted in a substantial savings, and with virtually no inconvenience to the defendant.

Of course, defendant's conduct in *Wagon Mound II* could have been no more culpable in fact than defendant's conduct in *Wagon Mound I*, since precisely the same conduct was involved. Yet the language of the court in *Wagon Mound II* emphasized the culpability of that conduct. That emphasis does not necessarily imply judicial disingenuousness;[40]

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39. *Id.* at 643, where the court noted the inexcusability of defendant's negligence:

> In the present case there was no justification whatever for discharging the oil into Sydney Harbour. Not only was it an offence to do so, but it involved considerable loss financially. If the ship's engineer had thought about the matter, there could have been no question of balancing the advantages and disadvantages. From every point of view it was both his duty and his interest to stop the discharge immediately.

Id.

40. *See Kinsman I*, 338 F.2d 708 (2d Cir. 1964). The court stated:

> The weight of authority in this country rejects the limitation of damages to consequences foreseeable at the time of the negligent conduct when the consequences are "direct," and the damage, although other and greater than expectable, is of the same general sort that was risked. . . . [I]ndeed, we wonder whether the British courts are not finding it necessary to limit the language of *The Wagon Mound* as we have indicated.

Id. at 724-25 (Friendly, J.) (footnotes and citations omitted). *See* PROSSER, note 2 *supra*:

> Six years later the Privy Council retreated somewhat from its position [taken in Wagon Mound I] in Wagon Mound [II], where the action was for damage to ships docked at the same wharf. This time there was evidence justifying the conclusion that the defendants were, or should have been, aware that there was some slight risk that the oil on the water would be ignited, although it was very unlikely. It was held that since the conduct of the defendants had no justification or social value, they were not justified in neglecting even that slight risk, and they were therefore liable. The decision would appear to have adopted the American formula of balancing magnitude of risk and gravity of harm against utility of conduct, and to have applied it to foreseeability in relation to "proximate cause." The effect would appear to be to let the Polemis Case in again by the back door, since cases will obviously be quite infrequent in which there is not some recognizable slight risk of this character.

Id. at 266 (footnotes omitted).

I believe that the opinion in *Wagon Mound II*, rather than "back-dooring" *Wagon Mound I*, displays an appropriate sensitivity to the degree of culpability attributable to the defendant and the relationship between that degree of culpability and the basic

rather, it reflects the court's sensitivity to the significance of the relative degree of culpability attributable to the defendant in resolving a proximate cause issue. The easy and costless avoidance of the discharge of the furnace oil, when conjoined with the reasonably foreseeable consequence of fire, resulted in the *Wagon Mound II* court finding the defendant sufficiently culpable to justify imposing liability for the fire-damaged ships.

By taking some liberties with the facts of *Wagon Mound I*, the efficacy of the second test for proximate cause can be demonstrated, provided the first test (*Palsgraf*)[41] has been met. Assume that the furnace oil created no reasonably foreseeable risk of fire, as was finally determined in that case, but that it did create a reasonably foreseeable risk of coming in contact with the "slipways [of plaintiff's wharf] and congeal[ing] upon them [thus] interfer[ing] with [the] use of the slips."[42] Contrary to the actual facts of the case, further assume that it was reasonably foreseeable that the interference with the use of the slipways of the wharf would result in substantial loss to the wharf owner, a loss approximately equal in dollar value to the cost to the wharf owner of the fire damage to his property. In those circumstances, should proximate cause preclude liability for the fire loss?

Based on the premise that it was reasonably foreseeable for the escaping oil to contact the slipways so as to cause a substantial loss from this interference with their use, had that type of damage in fact occurred, the defendant undoubtedly would have been liable therefor. If that loss would not have been substantially greater than the actual fire loss, would subjecting the defendant to liability for the fire loss have resulted in imposing a liability wholly disproportionate to culpability? Presumably, it would not since the dollar value of the fire loss did not substantially exceed the dollar value of the loss reasonably foreseeable as a consequence of the defendant's negligence. Therefore, it may be argued that the *Wagon Mound* test for proximate cause should be rejected under circumstances where a defendant's conduct creates a reasonably foreseeable risk of substantial property damage, and substantial property damage occurs, but in a different manner.

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reason for the proximate cause requirement. Furthermore, there is little if any difference between Judge Friendly's view that the damage be of "the same general sort that was risked" and the conclusions achieved in the two *Wagon Mound* cases. In *Wagon Mound II*, the court said, "the only question is whether a reasonable man having the knowledge and experience to be expected of the chief engineer . . . would have known that there was a real risk of the oil on the water catching fire *in some way* . . . ." 1 A.C. at 643 (emphasis added). Obviously the court did not intend to require that the precise manner of injury be reasonably foreseeable.

41. *See* text accompanying note 37 *supra*.

42. [1961] A.C. at 414.

If the principal reason for the proximate cause requirement is to ensure a parity between liability and culpability, and in a particular case the extent of liability for the actual loss would not substantially exceed the extent of liability for the reasonably foreseeable loss of another type, it seems appropriate to hold the defendant liable for the actual loss. Are there reasons to forego such a straightforward conclusion?

It could be asserted that the imposition of liability for property damage different in kind from the foreseeable loss, although not greater in extent, might lead the defendant and others similarly situated to be less conscientious and less careful in their future conduct. Although that imposition of liability would enlarge the scope of potential liability — suggesting the need for greater conscientiousness and carefulness — its imposition absent foreseeability of consequences could induce persons to take an attitude of shoulder-shrugging and resignation. If one faces potential liability for nonforeseeable consequences, the incentive for exercising care to avoid the foreseeable ones arguably is absent. The latter care is difficult enough; liability for the former tends to frustrate any reasonable expectations and, for that reason, to dissuade actors from the thoughtful exercise of care. That criticism, stated from the perspective of potential defendants, an all-encompassing class, could be elevated to a jurisprudential concern. For example, it may be contended that holding defendants liable for nonforeseeable consequences as well as foreseeable ones, insofar as the dollar value of the former does not substantially exceed the dollar value of the latter, would denigrate the concept of proximate cause to the status of a fortuitous relationship between dollar values of different losses.

These concerns may be presumed to have significance, yet their appreciation need not preclude liability for all nonforeseeable losses. The resigned attitude of potential defendants can be guarded against by limiting the imposition of liability for the nonforeseeable loss to those circumstances in which that loss could have been prevented by the same type of care which would have prevented the foreseeable loss. Thus, in the above hypothetical,[43] the defendant would be subjected to liability for nonforeseeable fire damage to the wharf because that damage could have been prevented by the same conduct which would have prevented the foreseeable and equally extensive loss caused by the oil's interference with the slipways, *viz.*, preventing the discharge of the oil. Given that limitation, a defendant is likely to continue exercising that care which would prevent the foreseeable loss, because the same exercise of care would prevent liability for the unforeseeable

43. *See* text accompanying note 42 *supra.*

loss. Jurisprudentially, the conclusion as thus limited can be justified by noting that it: (1) imposes no additional burden on the defendant in terms of the cost of avoiding liability; (2) permits recovery by the injured plaintiff for his actual loss when the extent of such recovery is commensurate with the defendant's culpability; and (3) may enhance the likelihood of the defendant's exercising that care which would avoid both losses. Consequently, where a defendant's conduct creates a reasonably foreseeable risk of substantial property damage and substantial property damage of a different sort occurs, proximate cause should not preclude liability in those cases in which the actual damage could have been prevented by the same type of care which would have prevented the foreseeable loss.

This does not entail the complete rejection of the *Wagon Mound* proximate cause requirement;[44] preserving that requirement would serve an important purpose since it would be dispositive in a substantial number of proximate cause cases. These cases would include those in which a defendant's conduct did not create a reasonably foreseeable risk of substantial property damage occurring in a manner different from the actual property damage, but only a reasonably foreseeable risk of minor property damage of a type different from the type of minor property damage which actually occurred.

Imposing liability in a case such as our hypothetical ensures that a direct relationship between the existence of proximate cause and the culpability of the defendant will be maintained. If a defendant's conduct creates a reasonably foreseeable risk of substantial damage to a plaintiff's property, that conduct is more culpable than conduct which creates only a reasonably foreseeable risk of minor damage to property. A relatively high degree of culpability is inherently significant in resolving a proximate cause issue, given the basic reason for the proximate cause requirement. Where, as in the afore-mentioned hypothetical,[45] the discharge of furnace oil creates a reasonably foreseeable risk of substantial damage to the plaintiff's property because of its adverse and prolonged effect on the slipways, but the plaintiff's loss is occasioned by fire and does not significantly exceed the reasonably foreseeable loss, the court should then see through the random occurrence of type A damage instead of type B damage to the culpability of the defendant's conduct itself.

A hypothetical situation, suggested by the *Palsgraf* case,[46] which involves personal injury rather than property damage poses a test for this approach. To begin, assume that a passenger boarding a commer-

44. *See* text accompanying note 37 *supra.*
45. *See* text accompanying note 42 *supra.*
46. 248 N.Y. at 342-43, 162 N.E. at 100. *See* text accompanying note 29 *supra.*

cial airplane flight is carrying a crate marked TNT, and that the flight attendant strongly insists that the crate may not be carried aboard. Suppose the flight attendant carelessly causes the crate to fall from the top of the boarding ladder to the runway below. Upon impact, the crate shatters and the pekinese within runs out and bites the plaintiff, who is standing 100 feet from the boarding ladder and waving goodbye to a relative taking the flight. The plaintiff sues the defendant airline company to recover for his injuries. The defendant's employee was careless, the plaintiff was injured, and there was a factual cause and effect relationship between carelessness and injury. How should the proximate cause issue be resolved if the defendant moves for a directed verdict?

Applying the two-step process suggested by *Palsgraf* and *Wagon Mound*,[47] the court should grant the defendant's motion only if it concludes that no reasonable jury could answer the two following questions affirmatively: Was the plaintiff within the orbit of risk? Was the manner of injury which occurred within the general manner of injury reasonably foreseeable? Given the TNT marking on the crate, it would seem apparent that the negligence attributable to the defendant created a reasonably foreseeable risk of injury of some kind to the plaintiff, even though his position was some distance from the boarding ladder. In considering the second question, and a reasonable jury's capacity to answer it affirmatively, the court is almost certain to be influenced by the high level of culpability of the defendant's conduct. The crate, after all, warned of TNT. Common sense virtually compels the conclusion that subjecting the defendant to potential liability would not generate liability incommensurate with culpability. Presumably, then, the court would not fashion a description of the general manner of injury reasonably foreseeable as a consequence of that culpable conduct so as to preclude the actual manner of injury. Clearly, the court should deny the defendant's motion and submit the case to the jury.

Retaining the same basic hypothetical, but substituting property damage for personal injury, also presents an interesting result. Suppose the pekinese bites a hole in the suitcase of a recently deplaned passenger standing 100 feet from the boarding ladder. If the plaintiff sues the defendant airline company to recover for that property loss and the defendant moves for a directed verdict, the court should rule against it. A jury could reasonably conclude that the culpable conduct created a foreseeable risk of injury of some kind to the plaintiff and that the manner of injury which occurred was within the general manner of injury reasonably foreseeable from the release of the contents of

47. *See* text accompanying note 37 *supra*.

the crate. Of course, the fact that the culpable conduct created reasonably foreseeable consequences of personal injury and death as well as property damage would alone justify that result under the formulation suggested earlier herein.[48] Even setting aside the reasonably foreseeable risks of personal injury and death, the result is a rational one. The defendant's conduct created a reasonably foreseeable risk of substantial property damage to all that property within the foreseeable explosive range of the crate. The fact that only a suitcase was damaged, and that by a dog, does not reduce the degree of culpability, which ought to be judged at the time of the conduct attributable to the defendant. Subjecting the defendant to potential liability for the damaged suitcase certainly creates no risk of liability wholly disproportionate to culpability. That conclusion supports the proposition posited earlier[49] that if a defendant's negligence creates a reasonably foreseeable risk of substantial damage to a plaintiff's property, thereby satisfying the orbit of risk test, and substantial damage to that property does in fact occur, although in a different manner, in those cases in which the same type of care would have protected against both risks, the court should envision the general manner of injury reasonably foreseeable in flexible and broad enough terms so that the actual injury would be encompassed in its view.

IV. Culpability and the Intervening Cause

Another type of proximate cause problem invites examination because, at least implicitly, judicial results in this category of cases are susceptible of explanation in terms of the relative degree of culpability. In *Watson v. Kentucky and Indiana Bridge & Railroad*,[50] the defendant's alleged negligence caused the contents of a gasoline tank car to run into a public street. Subsequently, a man named Duerr dropped a lighted match into the gasoline vapor. The resulting explosion injured the plaintiff, a bystander. There was conflicting evidence whether Duerr's conduct was inadvertent or malicious. The court held that if Duerr's conduct had been merely inadvertent or negligent, the defendant could be held liable for the plaintiff's injuries. On the other hand, if Duerr had "acted maliciously or with intent to cause the explosion,"[51] such conduct would be superseding so that the defendant could not be held liable for the plaintiff's injuries. The court explained its reason for imposing liability on the defendant in the case of an intervening negligent act, and for failing to impose such liability in the

48. *See* note 32 and accompanying text *supra*.
49. *See* text accompanying note 45 *supra*.
50. 137 Ky. 619, 126 S.W. 146 (1910).
51. *Id.* at 630, 126 S.W. at 150.

case of an intervening malicious act by a third party, by stating that the former interference is foreseeable whereas the latter is not.[52] In essence, the court recognized that the act of an individual in negligently or inadvertently lighting a match in the presence of gasoline was a predictable event; therefore, the defendant who was responsible for the escaping gas should be held accountable for the resulting explosion and its consequences. The intentional lighting and throwing of a match into the gasoline by an individual, on the other hand, was not a normal response under the circumstances, and the defendant, therefore, should not be held liable for the consequences of this intervening act. While the result achieved by the court is thoroughly commendable, its rationale that the defendant could have guarded against a negligent but not an evil-minded defendant falls short. Assuming that the defendant negligently caused the gasoline to be in a public street, it would seem apparent that the plaintiff bystander would be within the orbit of risk (*Palsgraf*) and that the manner of injury which occurred (explosion) would be within the general manner of injury reasonably foreseeable (*Wagon Mound*). Duerr's intervening act,

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52. *Id.* at 632-33, 126 S.W. at 150-51. The court stated:

> If the presence on Madison Street in the city of Louisville of the great volume of loose gas that arose from the escaping gasoline was caused by the negligence of the [defendant] Bridge & Railroad Company, it seems to us that the probable consequence of its coming in contact with fire and causing an explosion was too plain a proposition to admit of doubt. Indeed, it was most probable that some one would strike a match to light a cigar or for other purposes in the midst of the gas. In our opinion, therefore, the act of one lighting and throwing a match under such circumstances cannot be said to be the efficient cause of the explosion. It did not of itself produce the explosion, nor could it have done so without the assistance and contribution resulting from the primary negligence, if there was such negligence, on the part of the . . . Bridge & Railroad Company in furnishing the presence of the gas in the street. This conclusion, however, rests upon the theory that Duerr inadvertently or negligently lighted and threw the match in the gas. . . .
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> If, however, the act of Duerr in lighting the match and throwing it into the vapor or gas arising from the gasoline was malicious, and done for the purpose of causing the explosion, we do not think [defendant] would be responsible, for while the [defendant's] negligence may have been the efficient cause of the presence of the gas in the street, and it should have understood enough of the consequences thereof to have foreseen that an explosion was likely to result from the inadvertent or negligent lighting of a match by some person who was ignorant of the presence of the gas or of the effect of lighting or throwing a match in it, it could not have foreseen or deemed it probable that one would maliciously or wantonly do such an act for the evil purpose of producing the explosion. Therefore if the act of Duerr was malicious . . . it was one which the [defendant] could not reasonably have anticipated or guarded against, and in such case the act of Duerr, and not the primary negligence of the [defendant] . . . was the efficient or proximate cause of [plaintiff's] injuries.

Id.

whether negligent or intentional, did not enlarge either the orbit of risk or the general manner of injury reasonably foreseeable.

Contrast *Watson* with *Holloway v. Martin Oil Service, Inc.*[53] The defendant's employee sold one or two gallons of gasoline in a can to a group of intoxicated young men who said their car had run out of gas.[54] The men then used the gasoline to commit arson. The object of their crime was a dance hall which had earlier denied the men admission. The plaintiffs, burned in the dance hall fire, sought to recover for their injuries from the defendant service station owner. The Court of Appeals of Michigan affirmed the trial court's granting of the defendant's motion for directed verdict.[55] In *Holloway*, the intervening criminal act of arson had a marked effect on the orbit of risk generated by the conduct attributable to the defendant. Those injured in the dance hall fire certainly were not within the orbit of risk created by the original allegedly negligent act of selling gasoline to a group of intoxicated young men who asserted that their car had run out of gas; no injury of any kind to the dance hall patrons was reasonably foreseeable at the time of the sale. In addition, the intervening act of arson probably resulted in a manner of injury outside the general manner of injury reasonably foreseeable. Since the injured plaintiffs were without the orbit of risk as a matter of law and the manner of injury was without the general manner of injury reasonably foreseeable, probably as a matter of law, granting the defendant's motion for directed verdict was clearly correct.

In a hypothetical situation, however, suppose that after the sale of the gasoline, the intoxicated young men had returned to their car, poured the gasoline into the tank and driven off. Suppose further that as a result of the driver's intoxication, the car then struck a pedestrian.[56] Has the plaintiff pedestrian a legally sufficient case against the

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53. 79 Mich. App. 475, 262 N.W.2d 858 (Ct. App. 1977).

54. In fact, the employee provided the gasoline only after an implicit threat had been made. "[The employee] continued to refuse service until [one of the young men] 'started putting his hand in his pocket' and asked 'are you going to put gas in there?'" *Id.* at 477, 262 N.W.2d at 859 (quoting the trial court). That coercion seems not to have been critical to the court's opinion, although obviously it would make it more difficult to label the employee's conduct negligent.

55. *Id.* at 482, 262 N.W.2d at 862.

56. The *Holloway* Court noted the distinction between the actual case and the hypothetical suggested in the text:

> Assuming the truth of the young men's story—that their car had run out of gas—we hold that it should have been foreseen . . . that giving a group of intoxicated individuals the means to propel a dangerous instrumentality (a motor vehicle) is likely to result in personal injury and/or property damage as a result of the use of the instrumentality. In other words, defendant would owe a duty to people injured by the *vehicle* (either in other automobiles or in a pedestrian capacity) and

defendant service station owner? In selling gasoline to a visibly intoxicated group of young men who asserted that their car had run out of gas, the defendant's employee may have been negligent and there seems to be a factual cause and effect relationship between the employee's negligence and the plaintiff's injury. With regard to the question of whether the conduct attributable to the defendant was a proximate cause of the plaintiff's injury, a reasonable jury could find that the plaintiff was within the orbit of risk created by the defendant's conduct. The circumstances of the sale should have implied the likelihood of drunk driving. Similarly, a reasonable jury could conclude that the manner of injury which occurred was within the general manner of injury reasonably foreseeable. Indeed, given the reasonable foreseeability of drunk driving which a jury could find to resolve the orbit of risk test affirmatively, the reasonable foreseeability of the manner of injury would tend to follow automatically. Therefore, the hypothetical differs from the actual *Holloway* case in two legally significant ways. In *Holloway*, the trial judge could well conclude as a matter of law that: (1) plaintiffs were not within the orbit of risk; and (2) the manner of injury which occurred was not within the general manner of injury reasonably foreseeable. In the case of the hypothetical, neither of those matter-of-law conclusions appears appropriate. In those respects, *Watson*[57] would seem to resemble the hypothetical more than it resembles the actual *Holloway* case. In *Watson*, plaintiff was within the orbit of risk and the manner of injury which occurred was within the general manner of injury reasonably foreseeable, whether Duerr acted negligently or intentionally.

It is also noteworthy that the conduct of the defendant service station employee was the same whether it took place in the context of the *Holloway* case or the hypothetical; therefore, the culpability and social utility[58] of that conduct remain constant regardless of whether the

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property damage caused by the *vehicle*. Here, however, the vehicle did not cause the injury. To hold that [defendant is] liable for injuries stemming from an arson, on these facts—where there is no testimony to indicate that [defendant] should have been aware that an arson was planned—would effectively end the practice of selling gasoline in containers, for use in emergencies and for other uses.

Id. at 480-81, 262 N.W.2d at 861 (emphasis in original).

57. *See* notes 50-52 and accompanying text *supra*.

58. In Moning v. Alfono, 400 Mich. 425, 254 N.W.2d 759 (1977), 11 year-old Joseph Alfono bought two 10-cent slingshots and gave one to 12 year-old Royal Moning. A pellet from Joseph's slingshot struck Royal in the eye, causing the loss of sight in that eye. The plaintiff sued the slingshot manufacturer, wholesaler, and retailer, asserting that the marketing of slingshots directly to children was negligent. The trial court directed a verdict for the defendants. The Supreme Court of Michigan reversed and remanded for new trial, concluding that "[t]he resolution of the balance between the utility of children having ready-market access to slingshots and the risk of harm thereby created is an aspect of the

plaintiff's injuries resulted from arson or drunk driving. Similarly in *Watson*, the social utility and culpability of the defendant's conduct remain constant whether Duerr acted negligently or intentionally; precisely the same conduct on the part of the defendant existed. Why then in *Watson* should Duerr's conduct, if intentional, be deemed superseding even though it neither enlarged the orbit of risk nor the general manner of injury reasonably foreseeable?

One additional distinction between *Holloway* and the hypothetical[59] is that in *Holloway*, the intervening act of arson entailed overwhelming culpability of a criminal nature involving the intention to cause personal injury or property damage or both. In the hypothetical, however, the intervening act was drunk driving. While deplorable, obviously culpable, and even criminal,[60] that conduct was not done with the intention of causing personal injury or property damage. Given the overwhelming culpability of the intervening act in *Holloway*, judicial sensibilities probably would be offended by the imposition of liability on the merely negligent defendant for consequences contributed to by the arson. However, given the less culpable intervening act in the hypothetical, judicial sensibilities probably would not be offended by the imposition of liability on the merely negligent defendant for consequences contributed to by the drunk driving.

It is precisely that kind of judicial sensitivity to the relative degree of culpability of the intervening act which explains the result in *Watson*. If Duerr's act of dropping a lighted match into the gasoline vapor was done with the intention of causing an explosion, judicial sensibilities would be offended by the imposition of liability on the merely negligent defendant for consequences contributed to by that overwhelmingly culpable intervening act, despite the fact that the plaintiff may have been within the orbit of risk created by the defendant's negligence and that the manner of injury was within the general manner of injury reasonably foreseeable as a result of the defendant's

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determination of the reasonableness of that risk and of the defendants' conduct, and should be decided by a jury . . . ." *Id.* at 434, 254 N.W.2d at 763. The contrary result in *Holloway* reflects, in part, the court's sensitivity to the different levels of social utility of defendants' conduct in the two cases. Marketing slingshots directly to children presumably has a significantly lower level of utility than "selling gasoline in containers, for use in emergencies and for other proper uses." 79 Mich. App. at 481, 262 N.W.2d at 861.

59. *See* text accompanying note 56 *supra*.

60. *See, e.g.*, MICH STAT. ANN. § 9.2325(a), (c), (d) (Supp. 1980):

> It shall be unlawful and punishable [by imprisonment for not more than 90 days, or a fine of not less than $50.00 nor more than $100.00 or both and by suspension of operator's license for a period of not more than 2 years] . . . for a person . . . who is under the influence of intoxicating liquor . . . to drive a vehicle upon a highway or other place open to the general public . . . within this state.

negligence. If, on the other hand, Duerr's act was done inadvertently or negligently, a court would hardly find it difficult to impose liability on the negligent defendant for consequences contributed to by the intervening negligent act, in circumstances where the plaintiff was within the orbit of risk created by the defendant's conduct and the manner of injury which occurred was within the general manner of injury reasonably foreseeable as a result of the defendant's conduct. Consequently, the result in *Watson* is explicable in terms of a judicial sensitivity to the relative degree of culpability of the defendant's conduct, the relative degree of culpability of the intervening act, and the reltionship between those two degrees of culpability.

Suppose that, in *Holloway*, the intoxicated young men purchasing the gasoline from the defendant's employee had said, "Fill the can. We've got a dance hall to torch." How would that affect the legal sufficiency of the plaintiffs' case against the defendant? Rather clearly, that hypothetical language would tend to bring the plaintiffs within the orbit of risk and the manner of injury within the general manner of injury reasonably foreseeable. Given that language, it is doubtful that the trial court would have been willing to answer in the negative either the orbit of risk or general manner of injury reasonably foreseeable question as a matter of law. Moreover, that language tends to enhance substantially the relative degree of culpability of the conduct attributable to the defendant. Arguably, the enhancement of culpability is sufficiently significant that judicial sensibilities would not likely be offended by exposing the defendant to liability for consequences contributed to even by an intervening act of arson.

In *Underwood v. United States*,[61] the decedent was shot and killed by her former husband. A wrongful death action was brought pursuant to the Federal Torts Claim Act.[62] Airman Dunn, recently divorced from his wife, had received psychiatric treatment at a base hospital in Montgomery, Alabama.[63] During the course of treatment, it was determined that Dunn's problems were intimately related to the divorce and his feelings toward his former wife and their three children. In addition, it was determined that Dunn had the potential of injuring himself or his former wife.[64] Dunn was returned to duty with the Air Police Squadron without any recommended restrictions. In violation of Air Force Regulations, Dunn was permitted to obtain the use of a .45 caliber automatic pistol and ammunition without proper military authorization

61. 356 F.2d 92 (5th Cir. 1966).
62. 28 U.S.C. §§ 1346(b), 2671-2680 (1976).
63. 356 F.2d at 94.
64. *Id.* at 96.

and supervision.[65] Dunn used the gun to kill his former wife at her place of employment in Montgomery.[66]

The Fifth Circuit concluded that the negligence of certain Air Force personnel was a proximate cause of the decedent's death. Based upon the information available to the defendant's agents, the decedent was found to be within the orbit of risk created by their negligence and the manner of injury (homicide) was determined to be within the general manner of injury reasonably foreseeable as a result of that negligence. Although homicide is the ultimate culpable intervening act, the court was not hard-pressed to find the negligent defendant liable for the decedent's death because its culpability had been significantly enhanced by its knowledgeable position in reference to Dunn's volatile condition.[67]

Consequently, a court presented with a proximate cause issue in a case involving an intervening criminal act should be considerate of two important questions: (1) Did the intervening act enlarge either the orbit of risk or the general manner of injury reasonably foreseeable; and (2) what was the relationship between the relative degree of culpability attributable to the defendant and the relative degree of culpability attributable to the intervening actor? If the intervening criminal act did not enlarge either the orbit of risk or the general manner of injury reasonably foreseeable, it should not be deemed superseding unless, when compared to the culpability attributable to the defendant, it was of such overwhelming culpability that it tends, on balance, to exonerate the negligent defendant.

V. Culpability and Purely Economic Losses

Judicial sensibilities also seem to be offended by the prospect of imposing liability on the merely negligent actor in cases in which the plaintiff's injury consists of purely economic loss. *Petition of Kinsman Transit Co.* provides an ideal context in which to examine that judicial reaction because the same operative facts gave rise to two cases, one involving damage to property[68] and the other involving purely economic losses.[69] Due to negligence attributable to Kinsman Transit Company (ship owner) and Continental Grain Company (dock owner), the *S.S. MacGilvray Shiras* slipped her moorings and traveled downstream where she collided with the *S.S. Michael Tewksbury*. That impact caused

65. *Id.* at 98.
66. *Id.* at 94.
67. *Id.* at 99.
68. Petition of Kinsman Transport Co. (*Kinsman I*), 338 F.2d 708 (2d Cir. 1964), *cert. denied*, 380 U.S. 944 (1965).
69. Petition of Kinsman Transit Co. (*Kinsman II*), 388 F.2d 821 (2d Cir. 1968).

the *Tewksbury* to slip her moorings and the two ships continued downstream toward the Michigan Avenue Bridge. Despite phone calls urging that the bridge be raised so that the ships would not strike it, the employees of the City of Buffalo failed to raise the bridge in time. The *Tewksbury* struck the bridge so that its south tower collapsed. The two ships and the downed portion of the bridge dammed the flow of the river, causing flooding on adjacent land upstream as far as the Continental dock, some three miles from the bridge. In *Kinsman I*, owners of the flooded properties sought damages from Kinsman, Continental, and the City of Buffalo. Judge Friendly found such liability to be appropriate, concluding, in effect, that the claimants were within the orbit of risk created by the defendants' negligence and that the manner of injury which occurred was within the general manner of injury reasonably foreseeable.[70]

In *Kinsman II*,[71] the claimants were Cargill, Incorporated and Cargo Carriers, Incorporated. At the time of the ship's collision, Cargill had stored several hundred thousand bushels of wheat aboard another ship berthed in the harbor. However, as a result of the accident, the vessel could not be moved to grain elevators above the bridge for unloading. Consequently, Cargill was required to secure replacement wheat from another source in order for it to comply with its contractual obligations. Cargill sought damages for the extra transportation costs in the amount of $30,231.38, and for increased storage costs in the amount of

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70. 338 F.2d at 724. Judge Friendly offered this statement of the background facts of the case:

> The Buffalo River flows through Buffalo from east to west, with many turns and bends, until it empties into Lake Erie. Its navigable western portion is lined with docks, grain elevators, and industrial installations; during the winter, lake vessels tie up there pending resumption of navigation of the Great Lakes, without power and with only a shipkeeper aboard. About a mile from the mouth, the City of Buffalo maintains a lift bridge at Michigan Avenue. Thaws and rain frequently cause freshets to develop in the upper part of the river and its tributary, Cazenovia Creek; currents then range up to fifteen miles an hour and propel broken ice down the river, which sometimes overflows its banks.
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> On January 21, 1959, rain and thaw followed a period of freezing weather. The United States Weather Bureau issued appropriate warnings which were published and broadcast. Around 6 P.M. an ice jam that had formed in Cazenovia Creek disintegrated. Another ice jam formed just west of the junction of the creek and the river; it broke loose around 9 P.M.

Id. at 711-12. This very statement of the facts illustrates that an enhanced degree of culpability could be attributed to the three defendants, which the court did:

> We . . . hold that where, as here, the damages resulted from the same physical forces whose existence required the exercise of greater care than was displayed and were of the same general sort that was expectable, unforeseeability of the exact developments and of the extent of the loss will not limit liability.

Id. at 726.

71. 388 F.2d 821 (2d Cir. 1968).

$8,232.[72] Also because of the catastrophe on the river, Cargo Carriers could not unload a shipment of corn from a cargo vessel when it was broken loose from its moorings by one of the free-floating ships. Subsequently, an ice block formed between the vessel and the dock where the grain elevators were located. Since Cargo Carriers was under contract to transfer the corn, and the harbor tugs were prevented from breaking up the ice jam by the collapsed bridge, Cargo was required to unload the cargo of corn by using specially rented equipment. Cargo, consequently, sought an award in the amount of $1,590.40 for incurred expenses.[73]

The district court denied the claims of both, "reason[ing] that . . . the damages to Cargill and Cargo Carriers were caused by negligent interference with their contractual relations. In the absence of proof that the interference was intentional or with knowledge of the existence of the contracts [the district court] concluded recovery could not be grounded in tort."[74]

Judge Kaufman, writing for the Second Circuit, "prefer[red] to leave the rock-strewn path of 'negligent interference with contract' for more familiar tort terrain. Cargill and Cargo Carriers argue broadly that they suffered damage as a result of defendants' negligence and we will deal with their claims in these terms instead of the more esoteric 'negligent interference' ground."[75] Although Judge Kaufman, too, denied the claims, he did so because the injuries to Cargill and Cargo Carriers were too remote or indirect a consequence of the defendants' negligence.[76]

That conclusion, viewed against the backdrop of *Kinsman I*, creates a certain awkwardness, a feeling of at least uneven, if not inconsistent, conclusions. Apparently, Judge Kaufman was aware of that seeming awkwardness,[77] yet he did not permit recovery by Cargill and Cargo

72. *Id.* at 823.
73. *Id.*
74. *Id.*
75. *Id.* at 824.
76. *Id.*
77. Judge Kaufman found it necessary to admit the following:

> When the instant case was last here, we held—although without discussion of the Cargill and Cargo Carriers claims—that it was a foreseeable consequence of the negligence of the City of Buffalo and Kinsman Transit Company that the river would be dammed. It would seem to follow from this that it was foreseeable that transportation on the river would be disrupted and that some would incur expenses because of the need to find alternative routes of transportation or substitutes for goods delayed by the disaster. It may be that the *specific* manner was not foreseeable in which the damages to Cargill and Cargo Carriers would be incurred but such strict foreseeability—which in practice would rarely exist except in hindsight—has not been required.

Id. (emphasis added) (footnotes omitted).

Carriers. Judge Kaufman's ultimate answer was a reversion to the practical politics concept found in Judge Andrews' dissenting opinion in *Palsgraf*.[78] The same difficulty with that approach noted earlier[79] also applies here because a trial or appellate judge confronted with a proximate cause issue faces the dilemma of determining the proper application of the practical politics language to a particular set of facts. In other words, how can the subjective impression of expediency constitute a rule capable of rational application so that the diverging results in the two *Kinsman* cases are actually consistent?

The dissatisfaction with the court's analysis in *Kinsman II* exists because both the level of social utility of the defendants' conduct and the degree of culpability attributable to that conduct in *Kinsman II* are precisely the same as in *Kinsman I*. In terms of the *Palsgraf* test,[80] the claimants in *Kinsman II*, as users of the river in the immediate area of the calamity, were apparently within the orbit of risk. In terms of the *Wagon Mound* test, given the *Kinsman I* finding that the damming of the river was reasonably foreseeable, and the *Kinsman I* and *II* finding that the precise manner of injury need not be foreseeable, the inaccessibility of cargo was an injury sustained by Cargill and Cargo Carriers which was within the general manner of injury reasonably foreseeable. The difference in results between the two *Kinsman* cases must, therefore, derive from another source.

The most obvious distinction between *Kinsman I* and *II* is in the nature of losses suffered. The claimants in *Kinsman I* suffered damage to their property; the claimants in *Kinsman II* sustained purely economic losses. There exists a traditional reluctance on the part of courts to subject a negligent actor to potential liability for purely economic loss,[81] which may be explained by the sometimes tacit con-

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78. *Id.* at 825. Judge Kaufman quoted the "practical politics" language of Judge Andrews' dissenting opinion in *Palsgraf* which, he noted, had previously been referred to by Judge Friendly in *Kinsman I*. *See* note 10 *supra*.

79. *See* text accompanying note 10 *supra*.

80. *See* text accompanying note 37 *supra*.

81. *See* PROSSER, note 2 *supra* for a discussion of interference with contractual relations:

> No very satisfactory reason has been given for this refusal of a remedy in negligence cases. For the most part the courts have talked of "proximate cause," and have said that the consequences were too "remote." In all of the cases denying recovery the defendant had no knowledge of the contractual relation and no reason to foresee any harm to the plaintiff's interests; and this has led some writers to conclude that they do not mean that no negligence action could ever be maintained, but merely that there was no duty to the plaintiff in the particular instance. While this is very persuasive, it seems more likely that the courts are deliberately refusing to protect any contract against negligence, influenced by fear of an undue burden on freedom of action, the relative severity of the penalty which may be im-

cern that such liability may turn out to be wholly disproportionate to culpability, given the potentially enormous amounts of money involved in economic losses and the difficulty of anticipating all those who might sustain such purely economic losses.[82] To impose liability potentially in the millions of dollars on a negligent defendant who had no reason to contemplate that his culpability could generate such staggering consequences might well frustrate the basic reason for the proximate cause requirement. It is important, therefore, to determine if that concern would be well based in *Kinsman II*.

Both Kinsman (owner of the *Shiras*) and Continental (owner of the dock) were active commercial users of the river, each having a presumptive knowledge of the commercial use of the river made by others. The City of Buffalo (owner and operator of the drawbridge) certainly had presumptive knowledge of the commercial use made of the river. It would seem uncommonly awkward to assert on behalf of any of those culpable actors that the purely economic losses sustained by Cargill and Cargo Carriers were of a type beyond reasonable contemplation. Consequently, the imposition of liability on the defendants for the economic losses sustained by the claimants would hardly result in liability beyond reasonably foreseeable consequences. This strongly implies that such liability would not be incommensurate with culpability. Thus, we have concluded that in *Kinsman I* and *Kinsman II*: (a) the level of social utility of defendants' conduct was identical; (b) the degree of culpability attributable to that conduct was identical; (c) claimants were within the orbit of risk; (d) the manner of injury was within the general manner of injury reasonably foreseeable; and (e) the imposition of the liability sought by claimants would not be wholly disproportionate to defendants' culpability. All of this signifies that denying recovery to the claimants in *Kinsman II* was improper even though their losses were purely economic ones.

That observation is supported by *Union Oil Co. v. Oppen*.[83] The plaintiffs, commercial fisherman, sued to recover damages for lost profits occasioned by an oil spill emanating from an off-shore well operated by the defendants. The parties entered into a stipulation which provided, in part, that the defendants would pay the plaintiffs

posed upon mere negligence, the possibility of collusive claims and increased litigation and the difficulty of apportioning damages. If this is true, the question may at least be raised whether such a policy is not too narrow, and whether, as in the somewhat analogous case of the liability of the contractor himself to third parties, the law may not be expected to move in the future in the direction of recovery by those whose damages are foreseeable by the actor.

Id. at 940 (footnotes omitted).

82. *See* Just's, Inc. v. Arrington Const. Co., 99 Idaho 462, 470, 583 P.2d 997, 1005 (1978).

83. 501 F.2d 558 (9th Cir. 1974).

any damages not exceeding those which would have been paid under circumstances of defendants' negligence.[84] The defendants then moved for partial summary judgment, seeking "to eliminate . . . any element of damages consisting of profits lost as a result of the reduction in the commercial fishing potential [of the polluted water]."[85] That raised the issue of whether the negligent defendants could be held liable for purely economic losses sustained by the plaintiffs. The Ninth Circuit answered affirmatively.

Noting that "[b]oth the plaintiffs and defendants conduct their business operations away from land and in, on and under the sea,"[86] the court concluded that "the defendants could reasonably have foreseen that negligently conducted drilling operations might diminish aquatic life and thus injure the business of commercial fisherman."[87] In essence, the court found that the plaintiffs were within the orbit of risk and that the manner of injury was within the general manner of injury reasonably foreseeable. Moreover, even though the plaintiffs' loss was purely economic in nature, the imposition of liability for that loss would not result in liability beyond the reasonable contemplation of the defendants, given the relationship between the commercial activities of the plaintiffs and defendants. Apparently, in the court's view, such liability would not be wholly disproportionate to the defendants' culpability.

The judicial approach utilized in *Oppen* is noteworthy because it demonstrates an awareness of the *Palsgraf* and *Wagon Mound* tests[88]

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84. *Id.* at 560.

85. *Id.*

86. *Id.* at 570.

87. *Id.* at 569. It would be incorrect to dismiss the result in *Oppen* as one attributable to admiralty law in view of the court's own assessment of the scope of its inquiry:

> We are . . . not driven to the choice between maritime law and the law of California. So far as our research reveals, neither forum has made a definitive ruling on the precise issue before us. As a consequence, it has become necessary for us to examine a fairly large body of authorities, drawn from numerous jurisdictions and secondary sources, in order to reach what we regard as the proper resolution of this dispute. In that the same authorities and sources must be examined and evaluated without regard to whether this process is characterized as an examination of admiralty law or the law of California, we are convinced that under either body of law the actions of the special masters and the district judge in denying defendants' motion for partial summary judgment were correct.
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> . . . .
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> In any event, we shall proceed in a manner that we believe is faithful to the spirit of California tort law in disposing of the issue before us. For this reason we are content to say that for purposes of this case we regard it as irrelevant whether our efforts are designated an exposition of admiralty law or the law of California.

Id. at 562-63. *See also id.* at 571 (Ely, J., concurring).

88. *See* text accompanying note 37 *supra.*

plus the court's awareness that special stress may be applied to those tests when recovery for purely economic loss is sought. The court, moreover, did not simply revert to "practical politics" or state a mechanical rule such as "the merely negligent actor may not be liable for purely economic loss" in order to make an easy disposition of the case. Rather, it recognized that reasonable foreseeability of such economic losses was the touchstone of intelligent resolution and that reasonable foreseeability necessarily required an examination of the relationship, if any, which existed between the defendants' conduct and the plaintiffs' commercial activities.

In a later case a court denied recovery for purely economic loss from a negligent actor, yet gave additional indication of a growing judicial sensitivity to the significance of the relationship between defendant's conduct and plaintiff's commercial activity. In *Just's, Inc. v. Arrington Construction Co.*,[89] a lessee-business sought damages from a contractor for economic loss occasioned by the contractor's alleged negligence in performing a city-awarded contract for the renovation of a downtown business district. The negligence alleged was "failure to complete the project in a timely manner and to provide continuous access to plaintiff's business as required by the terms of the contract."[90] The plaintiff's business was within the renovation district. In denying such damages to the plaintiff, the court said:

> This plaintiff is surely not the only person who may have suffered some pecuniary losses as a result of the downtown renovation project. For example, others who may have suffered pecuniary losses could conceivably include not only all the other businesses in the area, but also their suppliers, creditors, and so forth, *ad infinitum*. In contrast to the recognized liability for personal injuries and property damage, with its inherent limitations of size, parties and time, liability for all the economic repercussions of a negligent act would be virtually open-ended. . . . If the defendant's liability were extended to all those who suffered any pecuniary loss, its liability could become grossly disproportionate to its fault. Such potential liability would unduly burden any construction in a business area.
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> However, there are exceptions to this rule against the recovery of purely economic losses, and the rule need not be applied mechanically. But such exceptions generally involve a special relationship between the parties . . . or unique circumstances requiring a different allocation of risk. *See, e.g., Union Oil Co. v. Oppen* . . . (commercial fishing grounds damaged by negligent oil spill). However neither situation is present in this case.[91]

In addition to evidencing sensitivity to the relationship between the parties, the court's excerpted language identifies the basic reason for the proximate cause requirement propounded in this article. The court

89. 99 Idaho 462, 583 P.2d 997 (1978).
90. *Id.* at 463, 583 P.2d at 998.
91. *Id.* at 470, 583 P.2d at 1005 (citations omitted).

further recognized the intimately related concern that, if that reason is ignored in a case in which defendant's conduct enjoys a relatively high level of social utility, society may be harmed as a result of unduly inhibiting the renovation of business districts. Exposing the allegedly negligent contractor to potential liability for economic losses sustained by the suppliers and creditors of businesses within the renovation district could frustrate the purpose of the proximate cause requirement and make future renovation projects economically prohibitive. Despite this reasoning, further analysis of the case is required before its refusal to compensate the plaintiff is commended.

Assume that the evidence offered by the plaintiff would justify factual conclusions that: (1) the defendant was negligent; (2) the plaintiff was injured economically; and (3) a factual cause and effect relationship existed between negligence and injury. Could a reasonable jury find that the plaintiff was within the orbit of risk created by the defendant's negligence in fulfilling the renovation contract? Presumably so since the plaintiff's business was within the business district under renovation and the defendant's negligence created a reasonably foreseeable risk of some kind of injury to the plaintiff. Could a reasonable jury find that the manner of injury, namely, the loss of business resulting from "failure to complete the project in a timely manner and to provide continuous access to plaintiff's business as required by the terms of the contract,"[92] was within the general manner of injury reasonably foreseeable? Merely to state the question impels an affirmative answer. Given the relationship between the defendant's conduct, renovating a business district, and the nature of the plaintiff's commercial activity, operating a business within the district under renovation, the economic loss suffered by the plaintiff is well within the bounds of the defendant's reasonable contemplation.[93] Concerning

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92. *Id.* at 463, 583 P.2d at 998. *See* text accompanying note 90 *supra.*

93. Ironically, the court in *Just's* concluded that the plaintiff could recover for its economic loss as a third-party beneficiary of the contract between the defendant and the city. The test which must be satisfied before a third party may enforce the terms of a contract between a private contractor and a public body was clearly set forth in Stewart v. Arrington Const. Co., 92 Idaho 526, 446 P.2d 895 (1968):

> In order to recover as a third party beneficiary, it is not necessary that the individual be named and identified as an individual although that is usually sufficient; a third party may enforce a contract if he can show he is a member of a limited class for whose benefit it was made .... The class may be limited either by a narrow description of the injuries to be guarded against and the damages to be paid ... or by a similar description of the class to be protected.

Id. at 532, 446 P.2d at 901 (citations omitted). Application of this test to the facts of *Just's* raises two issues: (1) Was the contract between the City of Idaho Falls and the defendant, particularly the provisions requiring the defendant to take specified measures to lessen

the hypothetical claimants who worried the court, such as suppliers and creditors of businesses within the area, a court could intelligently conclude that those hypothetical claimants were without the orbit of risk as a matter of law and, therefore, unable to recover purely economic losses from the defendant.[94] Consequently, while the court's continuing sensitivity to the basic reason for the proximate cause requirement and inherently related factors is to be applauded, its matter-of-law determination that the defendant's alleged negligence was not a proximate cause of the particular plaintiff's economic loss was the product of an overly broad application of that reason and those factors. More succinctly, the court failed to attach appropriate significance to the "special relationship" between the parties.

In *Berg v. General Motors Corp.*,[95] the plaintiff, a commercial fisherman, purchased a new boat which had been manufactured by the defendant. Because of allegedly negligent manufacture, the boat broke down during the fishing season. The plaintiff sought recovery for the anticipated value of the lost fish catch. The Supreme Court of Washington framed the legal issue as one involving purely economic loss.[96] The court arrived at its decision to compensate the plaintiff because the relationship which existed between the defendant manufacturer and the plaintiff purchaser was one which brought the economic loss sus-

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the disruption to the business in the area, for the benefit of a limited class? (2) If so, is the plaintiff a member of that class? The *Just's* court answered both those questions affirmatively, 99 Idaho at 464, 583 P.2d at 999, and in the process practically demonstrated that the plaintiff was within the orbit of risk generated by the defendant's conduct, that the manner of injury which occurred was within the general manner of injury reasonably foreseeable as a consequence of the defendant's conduct and that the plaintiff's economic loss was within the reasonable contemplation of the defendant as a consequence of the defendant's conduct.

94. Although the court in Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974), concluded that the economic losses sustained by the commercial fisherman constituted legally cognizable damages, it was also careful to discourage other claimants who may have sustained economic losses:

> Finally, it must be understood that our holding in this case does not open the door to claims that may be asserted by those, other than commercial fishermen, whose economic or personal affairs were discommoded by the oil spill of January 28, 1969. The general rule urged upon us by defendants has a legitimate sphere within which to operate. Nothing said in this opinion is intended to suggest, for example, that every decline in the general commercial activity of every business in the Santa Barbara area following the occurrences of 1969 constitutes a legally cognizable injury for which the defendants may be responsible.

Id. at 570.

95. 87 Wash. 2d 584, 555 P.2d 818 (1976).

96. *Id.* at 585, 555 P.2d 818, where the court stated: "This appeal involves the single issue of whether the law of negligence permits recovery by a purchaser of goods against a manufacturer for damages constituting solely economic loss as distinguished from damage to person or property?"

tained by the plaintiff within the reasonable contemplation of the defendant.[97]

If the plaintiff is within the orbit of risk generated by the defendant's negligence (*Palsgraf*)[98] and if the manner of injury is within the general manner of injury reasonably foreseeable as a consequence of the defendant's negligence (*Wagon Mound*),[99] that negligence should be deemed to be a proximate cause of the plaintiff's injury. Where the plaintiff's injury consists of a purely economic loss, resolution of the *Palsgraf* and *Wagon Mound*[100] tests is likely to be facilitated enormously by examining the relationship, if any, which existed between the defendant's conduct and the plaintiff's commercial activity for the purpose of determining if the plaintiff's economic loss was within the reasonable contemplation of the defendant. This analysis was applied in *Oppen*[101] and *Berg*[102] and also should have been applied in *Kinsman II*.[103]

Moreover, in order to assure a continuing judicial awareness of the significance of the relationship between the plaintiff and the defendant in those cases in which a plaintiff seeks damages for purely economic loss from a negligent defendant, it might well be appropriate for the court to articulate a third test in addition to the *Palsgraf-Wagon Mound*[104] tests: Given the relationship between the defendant's conduct and the plaintiff's commercial activity, could a reasonable jury find that the plaintiff's economic loss was within the reasonable contemplation of the defendant? In the *Berg*[105] case, the defendant and the plaintiff were at opposite ends of a distributive chain; the defendant

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97. The court characterized the special relationship between the defendant and the plaintiff as one which permitted the plaintiff recovery for his purely economic loss:

> "Foreseeability" and a duty to the complaining party must be proved . . . . The scope of the duty owed is measured by the foreseeability of the risk, and whether the danger created by that risk is sufficiently large to embrace the specific harm alleged to have occurred . . . . A manufacturer intending and foreseeing that its product would eventually be purchased by persons operating commercial ventures, owes such persons the duty not to impair that purchaser's commercial operations by a faulty product. The negligent manufacture of such an article sold, poses the foreseeable risk that the output of the entire enterprise would be diminished or even temporarily halted. The specie of harm generated by such work stoppage (lost profits) is well within the zone of danger created and foreseen by the negligent act.

Id. at 592-93, 555 P.2d at 822-23 (citations omitted).

98. 248 N.Y. 339, 162 N.E. 99 (1928). *See* text accompanying note 8 *supra.*

99. [1961] A.C. 388 (N.S.W.). *See* text accompanying note 34 *supra.*

100. *See* text accompanying note 37 *supra.*

101. 501 F.2d 588 (9th Cir. 1974). *See* text accompanying note 83 *supra.*

102. 87 Wash. 2d 584, 555 P.2d 818 (1976). *See* text accompanying note 95 *supra.*

103. 388 F.2d 821 (2d Cir. 1968). *See* text accompanying note 71 *supra.*

104. *See* text accompanying note 37 *supra.*

105. 87 Wash. 2d 584, 555 P.2d 818 (1976). *See* text accompanying note 95 *supra.*

manufactured the fishing boat and the plaintiff purchased the boat for commercial fishing. In those circumstances, an examination of the relationship between plaintiff and defendant virtually compels the conclusion that the plaintiff's commercial loss was within the reasonable contemplation of the defendant. In *Oppen*,[106] defendants and plaintiffs were engaged in separate commercial enterprises each of which had an intimate relationship with the immediate marine environment. When the defendants' conduct violated that environment, the plaintiffs' commercial loss undoubtedly was within the reasonable contemplation of the defendants. Similarly, in *Kinsman II*,[107] defendants and plaintiffs were engaged in separate commercial or governmental enterprises each of which had an intimate relationship with the navigable waters of the Buffalo River. When the defendants' conduct temporarily terminated the navigability of the river, it would seem that the plaintiffs' commercial loss would be within the reasonable contemplation of the defendants. In *Just's*,[108] the defendant's commercial activity (renovation of the downtown business district) was in geographical proximity to, and was intended to affect the profitability of, the plaintiff's commercial activity. Given that relationship, it follows that a reasonable jury could have concluded that the plaintiff's commercial loss was within the reasonable contemplation of the defendant at the time of the defendant's allegedly negligent conduct.

VI. Conclusion

As noted at the outset,[109] a dictionary definition of proximate cause is unlikely to be of meaningful assistance to a court confronted with a proximate cause issue. Intelligent resolution of that issue requires an awareness of the basic purpose underlying the proximate cause requirement and a continuing sensitivity to those affiliated factors relevant to that basic purpose. Additionally, a court should show caution and restraint in confronting a defense motion for directed verdict premised on the assertion that the defendant's conduct was not a proximate cause of the plaintiff's injury as a matter of law. Obviously, in each case in which the court concludes that a reasonable jury could resolve the proximate cause issue either way, the motion for directed verdict should be denied. It seems fair to assume, therefore, that juries, more often than judges, will be charged with the responsibility of making the dispositive determination of proximate cause issues.[110]

106. 501 F.2d 558 (9th Cir. 1974). *See* text accompanying note 83 *supra*.

107. 388 F.2d 821 (2d Cir. 1968). *See* text accompanying note 71 *supra*.

108. 99 Idaho 462, 583 P.2d 997 (1978). *See* text accompanying note 89 *supra*.

109. *See* notes 1 & 2 and accompanying text *supra*.

110. *See* Prosser, note 2 *supra*:

> In any case where there might be reasonable difference of opinion as to the

Yet, all too frequently, judicial instructions to juries required to resolve proximate cause issues offer little more than the terseness found in a legal dictionary.[111]

Even assuming that the instructions are complemented by additional language associating the generalities with the specific evidence heard by the jury, it is apparent that the jury will be given no insight into the basic reason for the proximate cause requirement and no assistance in identifying those practical concerns which are related to that basic reason. Consequently, while the court may have denied the defendant's motion for directed verdict because of the court's determination that a reasonable jury could resolve the proximate cause

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foreseeability of a particular risk, the reasonableness of the defendant's conduct with respect to it, or the normal character of an intervening cause, the question is for the jury, subject of course to suitable instructions from the court as to the legal conclusion to be drawn as the issue is determined either way. By far the greater number of the cases which have arisen have been of this description; and to this extent it may properly be said that "proximate cause is ordinarily a question of fact for the jury, to be solved by the exercise of good common sense in the consideration of the evidence of each particular case."

Id. at 290 (footnotes omitted).

111. Insofar as the instructions do not embody the concepts of which proximate cause consists, it is unlikely that the jury's determination will express those concepts, resulting in a nonapplication of the law even in those cases where the verdict appears satisfactory. Some fairly typical examples of judicial instructions evidence the dearth of this conceptual background:

> The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause — the one that necessarily sets in operation the factors that accomplish the injury. It may operate directly or by putting intervening agencies in motion.

Standardized Jury Instructions for the District of Columbia, Instruction No. 64, 50 (rev. ed. 1968).

> This does not mean that the law seeks and recognizes only one proximate cause of injury, consisting of only one factor, one act, one element or circumstance, or the conduct of only one person. To the contrary, several factors, for example, the acts and omissions of two or more persons, may work concurrently as the efficient cause of an injury, and in such a case, each of the participating acts or omissions is regarded in law as a proximate cause.

Id., Instruction No. 65 at 51 (to be added in cases involving concurring causes).

> When the negligent acts or omissions of two or more persons, whether committed independently or in the course of concerted conduct, contribute concurrently, and as proximate causes, to the injury of another, each of such persons is liable (in the absence of contributor, negligence). This is true regardless of the relative degree of the contribution. It is no defense for one of such persons that some other person, not joined as a defendant in the action participated in causing the injury, even if it should appear to you that the negligence of that other person was greater, in either its wrongful nature or it effect.

Id., Instruction No. 66 at 52 (to be added in cases involving concurring causes and multiple defendants).

issue either way, there is no assurance and very little likelihood that the jury's factual resolution will be a product of those considerations presumably weighed by the court in determining the legal sufficiency of the plaintiff's case, a patently undesirable outcome.[112]

One could assert, of course, that once the court has found the plaintiff's case legally sufficient in terms of the basic purpose of the proximate cause requirement and those factors intimately related to that purpose, there is no compelling need to instruct the jury on that reason and those factors. By concluding that a reasonable jury could resolve the proximate cause issue either way, the court has already determined that a jury verdict for the plaintiff would not impose liability wholly disproportionate to culpability. Therefore, there is no reason to supply the jury with anything more tedious than a lexicographer's definition of proximate cause. The a priori logic of this approach is somewhat appealing; however, for several reasons, the approach is inapposite.

The basic reason for the proximate cause requirement and each of the affiliated factors would seem to be ideally suited for jury consideration. It is the jury which ostensibly serves as a microcosm of society. The determinations of whether or not the imposition of liability would be incommensurate with culpability, the degree of culpability of a defendant's conduct, and the social utility of a defendant's activities should reflect the societal perspective which a jury has the unique power to express.

Second, in the case of a jury which is aware of the underlying reason for the proximate cause requirement and is instructed on the factors intimately related to that reason, its deliberations are much more likely to achieve results manifesting those underlying considerations. A jury instructed on a merely mechanical definition of proximate cause will probably achieve an unprincipled result.

Finally, despite any doubt of a jury's capabilities, it is possible for its members to work efficiently with those underlying considerations and to apply them rationally to a particular set of facts. Jurors can be extraordinarily competent and conscientious in their deliberations, given a court sympathetic to their needs; it is not naive to believe that with court guidance, jurors can collectively achieve a level of sophistication and perception which will exceed the total of their individual capacities in almost any other environment. The more conscientious a court is in affording the jury with comprehensible and informative in-

112. *See* J. HENDERSON, JR. & R. PEARSON, THE TORTS PROCESS (1975) where the authors state: "And finally in many cases the resolution of the proximate cause issue will depend on the degree of particularity with which the judge or jury defines the reasonably foreseeable consequences. The more general the description, the more likely will be the conclusion that the actual consequences were foreseeable." *Id.* at 420-21.

structions, the greater the likelihood that the jury will apply those instructions intelligently and assiduously to its interpretation of the facts evidenced at trial. Consequently, the broader judicial determination to deny a defendant's motion for nonsuit or directed verdict will ultimately provide the opportunity for a more refined application, by a reasoning jury, of those concepts that form the principle of proximate cause.